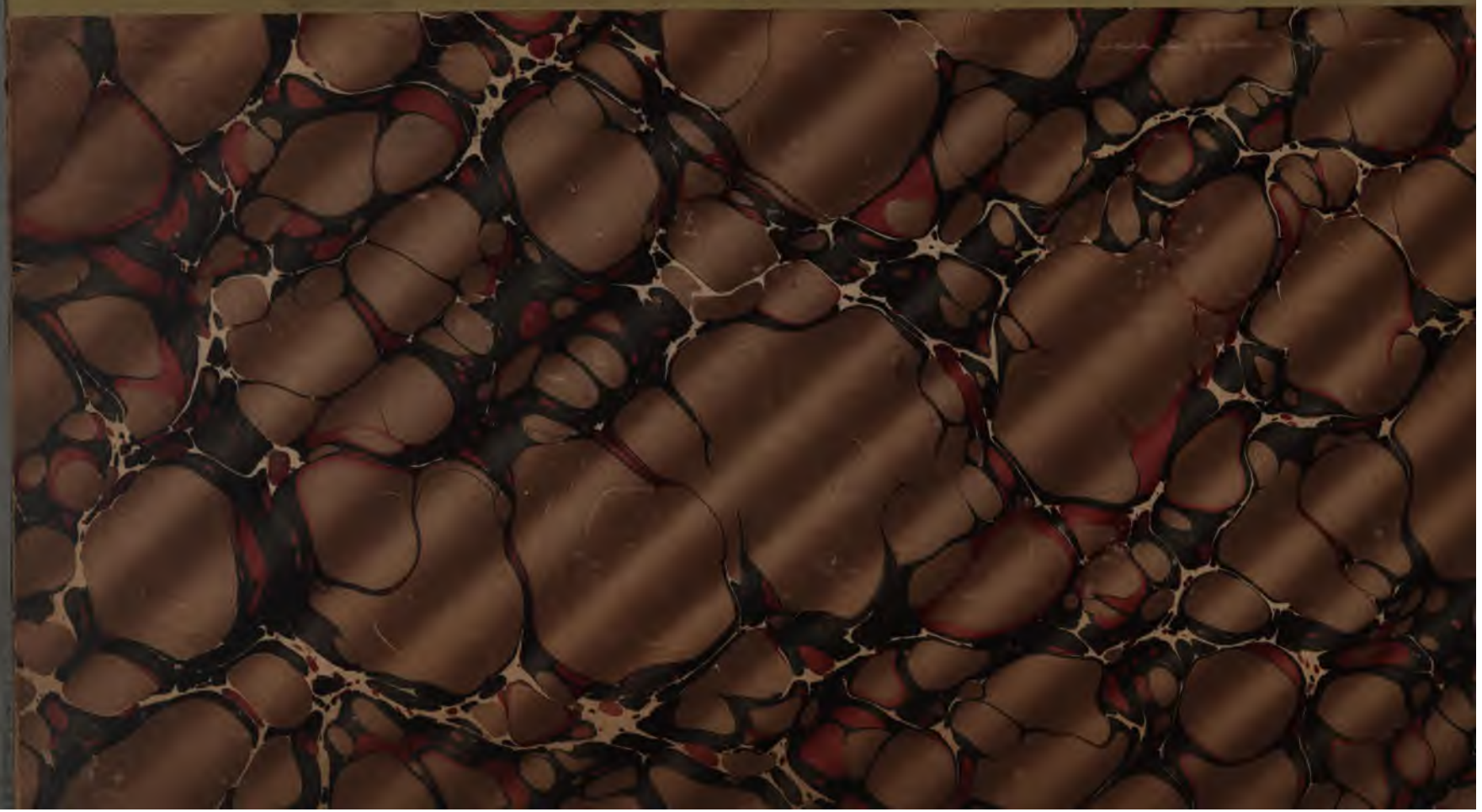
Rawle · Some Contrasts in the Growth of Pennsylvan
and English Laws · 1881



SOME CONTRASTS IN THE GROWTH OF PENNSYLVANIA AND ENGLISH LAW.

A LECTURE

DELIVERED

BEFORE THE STUDENTS

OF THE

LAW DEPARTMENT

OF THE

UNIVERSITY OF PENNSYLVANIA.

OCTOBER 3d, 1881.

BY

WILLIAM HENRY RAWLE, ESQ.

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1881.

PHILADELPHIA, October 11th, 1881.

WM. HENRY RAWLE, ESQ.,

DEAR SIR,

In accordance with a resolution adopted at a meeting of the Students of the Law Department of the University of Pennsylvania, it becomes our agreeable duty to solicit, for publication, your address, delivered on the 3d inst. Hoping this will receive favorable consideration,

We are, sir,

Very respectfully yours,

CHARLES W. MEYER, JR.,
FREDERICK M. LEONARD,
FRANCIS HENDERSON,
WILLIAM H. FOX,
WM. P. GEST,
R. G. SMITH,
CHARLES ADAMSON, Chairman.

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710 WALNUT STREET,
PHILADELPHIA, October 13th, 1881.

GENTLEMEN,

It gives me great pleasure to comply with the request contained in your kind note of the 11th inst.

Very respectfully yours,

WM. HENRY RAWLE.

CHARLES ADAMSON, Esq., Chairman, CHARLES W. MEYER, JR., FREDERICK M. LEONARD, FRANCIS HENDERSON, WILLIAM H. FOX, WM. P. GEST, R. G. SMITH, Esqs., Committee.

LECTURE.

GENTLEMEN OF THE UNIVERSITY CLASS:

In the month of March in the last year, one of your Faculty chose for his subject in addressing our Law Academy, certain points of contrast between the English and American Constitutions,[1] under the title of "Politics in England and the United States," and it has seemed to me that an attempt to contrast, in a very general and elementary way, certain parts of English and Pennsylvania jurisprudence, from the infancy and early manhood of this colony, may interest you. It would have been more interesting and more broadly useful, if the attempt could have been extended to embrace the other colonies which afterwards became the United States, for there would have been not only the contrast between the mother country and her colonies, but the contrast between the colonies themselves. We should have seen how, in some cases, one colony followed or imitated another in its alteration of the law which each had brought over, and how, in others, the law was changed in one colony to suit its needs, all unconscious of similar changes

[1] A lecture by the Hon. J. I. Clark Hare, before the Law Academy of Philadelphia, March 30th, 1880.

in another. Unhappily, this must be the History of the Future, for the materials have as yet been sparingly given to the world. They sleep, in manuscript, upon the shelves of State Departments, or are forgotten in their vaults. And even as in England it was not till recently thought worth while to produce, in intelligible form and language, those legal treasures upon which much of its law depends, so here but few States have thought it necessary to publish their early colonial statutes and records. We, in Pennsylvania, cannot, as to this, claim superiority over our sister States. At this day, the only complete set of the "Statutes at Large" outside the State Department, exists (largely in manuscript of course) in the private library of a late eminent Judge. Only within the last two years have our Provincial Statutes prior to 1700 been published,[1] and with that year the work has stopped. By this publication, it was recently said, in an address lately delivered by one of your graduates, "The origin of many distinctive features in our peculiar jurisprudence has been disclosed, the primitive constitution of the courts has been thoroughly explained, and the limits of their respective jurisdictions in early days for the first time clearly defined."[2]

It is idle to say that this sort of learning is for the

[1] Laws of the Province of Pennsylvania, passed between the years 1682 and 1700, preceded by Duke of York's Laws, in force from the year 1676 to the year 1682. Harrisburg, 1879.

[2] The Constitution, Jurisdiction and Practice of the Courts of Pennsylvania in the seventeenth century, by Lawrence Lewis, Jr., a paper read before the Historical Society of Pennsylvania, March 14th, 1881.

antiquarian or the historian, rather than the practical lawyer. We all remember how the law as to Charities was, within our own times, misconceived by our courts, as it had been by those who had gone before them, and how the publication of certain records from the Tower of London gave the material to show that such misconception had arisen from ignorance, and when it appeared by those records that chancery had entertained the jurisdiction over charities long before the Statute of Elizabeth, the scales fell from judicial eyes. And now it is that every clever student in his second year knows or can know more of the law as to charities than the most learned lawyer of sixty years ago. And to those who choose to think that in a money getting age and country, practical results are "the be all and the end all here," it may be suggested that the practical result of those records being published was the saving to this City of the fortune left to it by the will of Stephen Girard.

And even as I write there come in the proof sheets of Judge Cooley's Address in August last to the American Bar Association on "The recording laws of the United States," in which, referring to certain evils which exist in them, and, prominently, that which makes the record *prima facie* evidence, he says: "It would be interesting, if it were practicable, to trace in each State the history of its recording laws, and to ascertain how it was that such force came to be given by law to these records," and he refers to the earlier laws of two of the colonies, Rhode Island and Massachusetts, for the probable "real reasons" in them,

But that which was denied to him, is denied to me, and I must content myself with the attempt—and even now with very imperfect materials—to set before you "Some Contrasts in the growth of Pennsylvania and English Law."

I shall assume that with the general history of the colony, with what was done in England before Penn sailed thence and what was done here after his arrival, you are, at least in a general way, familiar. Those who are not, are more fortunate than the preceding generation as to the ease with which the information can now be obtained.

There are few more striking differences between the mother country and her colonies, from the first settlement of the latter down to the present day, than the system of registration of deeds, or, as it is generally called here, their recording. It was a favorite object of the old common law—I mean long before the Conquest—that possession of land and its transfer should be open and notorious, and the livery of seisin (the mode of transfer long before the introduction of deeds) was made in the presence of witnesses. And when later, though still in Saxon times, deeds came into use, it was the custom to transact all conveyances at the county court and enter a memorial of them in the leger book of some adjacent monastery, and these gradually became the depositories of the charters or title deeds of the great landed proprietaries. All such deeds as could be found were destroyed by William the Conqueror, as part of his policy that all

titles should commence from himself, and thenceforth we lose, for several hundred years, all trace of any such thing as registration. Not only this, but with the introduction of Uses, lands came to be secretly held and secretly conveyed, so that "scantly any person could be certainly assured of any lands by them purchased, nor know surely against whom they should use their actions or executions for their rights, titles and duties,"—so ran the preamble to the Statute of Uses—"to the utter subversion of the ancient common laws of this realm." In the same year of Henry VIII's reign were passed both the Statute of Uses and the first of the present registry Acts still in force, viz.: "The Statute for Inrollment of bargains and sales." But this, as also a subsequent local statute of Elizabeth, proved inoperative, first, by reason of being limited to deeds of estates of inheritance of freehold, (and the device was soon introduced of a bargain and sale for a term of years followed by a release of the reversion, which effectually evaded the statute), and secondly, because neither was there a place assigned for keeping the records, nor was the Registrar made responsible for his duty. During the time of the Commonwealth, the subject was more than once presented to Parliament and unsuccessfully, and it was not until the reign of Anne that there was passed the first of the statutes now in force, providing with some care, for the registration of all deeds in the West Riding of Yorkshire, and this was followed by similar local statutes in the same reign, and in those of William and Mary, and

George II. Their sum may be stated in that they applied to all the Ridings of York, the town and county of Kingston upon Hull, the county of Middlesex and the Bedford Level Tract, and in the preambles to those statutes you will find how earnestly are set forth the evils sought to be cured by registration. But such has been the settled dislike of the people—or at least that land holding portion of it which make the laws—that notoriety or even possibility of knowledge outside of those concerned should attend the transfer of land, that there has never been in England even an approach to the system which we have. Not that the subject has not been mooted. During the 18th century six registration bills were presented which never even went to a second reading. In the present century, in 1815, a statute for a general registration was presented by Romilly, which shared the same fate. In 1829, there was appointed the well known Commission with Mr. Campbell (afterwards Lord Campbell) at its head, "To enquire into the state of real property in England." Prominent in the enquiry was Registration, and you will find in the folio volumes of their Report, hundreds of pages of evidence of the ablest lawyers of the kingdom; evidence as to the register counties; evidence as to the English colonies; evidence as to some of the United States; evidence as to Continental States; the great weight of which, the Commission thought, was decisive upon the question. Accordingly they reported a bill which was introduced in an able speech by Campbell, and

opposed by Sugden and others, but it only passed a first reading. You will find the subject again brought up in 1831, in 1832, in 1833, and finally in 1834, after an elaborate debate, in which the opponents of the measure had really little more to urge than that there was a prejudice against it, the bill was lost on second reading by a vote of nearly three to one, and Campbell tells us in his Autobiography just published, with perhaps just a little malice, that it was owing to the country members being persuaded by their attorneys to vote against it.

In 1854 another Royal Commission was issued, which, after investigation, rejected the scheme for the registration of *deeds*, and recommended the registration of *titles*, and such a bill was, in 1859, brought in by Sir Hugh Cairns. It was dropped, however, and then, in 1862, was passed Lord Westbury's Act for the registration of *indefeasible* titles. There were, however, thought to be so few absolutely indefeasible titles that the Act practically came to nothing. Then came the Land Transfer Act of 1875, which was not compulsory, and came practically to nothing. Then, in 1878, was appointed a select committee to report what steps should be taken to facilitate the transfer of land, and a mass of important and interesting testimony was taken under it, including that of Lord Cairns, then Chancellor, who thought that one of the great objections to registration was that "in the English mind there was, at the bottom, a most profound respect for title deeds, and when the su-

preme moment comes at which a man is told that he must part with all his title deeds and receive in lieu a little piece of paper which is to be the evidence of his title to the land, the sacrifice is too great for human nature to make, and he declines to make it."[1] The committee reported a bill in the session of 1880, which went farther than any of the previous ones, and it might have passed, but for the pressure of business in an unusually protracted session, and finally, in the present session, there was passed the "Conveyancing and Law of Property Act," which received the royal assent but a few weeks ago (on August 22), but which omits any provisions as to registration.

It is somewhat curious that it seems to be almost taken for granted in England that no system of registration can be effectual which does not depend upon the good will of the land dealing community, in other words, that there can be no such thing practically as compulsory registration; but it would seem that nothing can be simpler than to provide for the postponement of the unregistered deed to the registered one, and this provision secures the practical, successful working of the system throughout the breadth of this country.

In contrast with the English system, how striking is the fact that from the earliest settlement of our colonies the benefits of registration were seen. In Pennsylvania, some years before the charter to Penn, it had been provided in the early provincial laws

[1] Report of Committee on Land Titles and Transfers, p. 146.

that every clerk of every Court of Sessions should enter all grants, bargains, sales and mortgages of land, "together with the estates of the grantor and grantee, things and estates granted, together with the date thereof." Then, in the "Laws agreed upon in England," shortly after the grant to Penn, provision was made for the registration of all charters, gifts and conveyances of land, except leases for a year and under, "in the public enrollment office of the province." This was accordingly approved and enacted in the "Great Law" passed at Chester in 1682, and in the next year it was declared that the laws as to registry should, like others deemed of great importance, such as those concerning Liberty of Conscience, Liberty and Property, Liberty of Person, Open Courts, Speedy Justice, that the Laws be in English, &c., be reputed and held for fundamental in the government of the province.

There is some curious learning about the various recording Acts which were passed after this, in 1688, 1693, 1700, 1705, 1710 and 1715, all of them, except the last, repealed by the Queen in council, and much that is interesting and not generally known as to the repeal of these laws and their re-enactment here at the singular intervals of five years; but time will not allow me to dwell upon this. It is enough here to say that finally the Act of 1715 was passed, which, escaping the fate of repeal, remains in full force to-day. It provided, in effect, for a record office in every county and that all deeds of land properly acknowledged and recorded were to have the force and effect of deeds of feoffment with livery and seisin,

or deeds enrolled in any of the King's Courts at Westminster. Except as to mortgages, however, the statute was not compulsory, and it was not until 1775 that it was *required* that *all* deeds and conveyances should be recorded within six months after their execution, or else to be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration.[1]

The strict letter of the statute is not, however, enforced as against a purchaser with notice of a prior unrecorded deed, and such is also the course of decision in England as to localities in which the Registry Acts are in force.

It may be here said that the British Statute of Inrollment on its face applied exclusively to lands within the realm of England, and was never considered to apply to the American colonies. It certainly did not to Pennsylvania, to Massachusetts or New York. In these, as in other colonies, either usage as early as the settlement of the colony, or statutes more or less similar to ours established the system of registration, and at this day such statutes are in force in all of the United States, and they are generally to the same effect, viz., that the unrecorded deed is invalid as against subsequent *bona fide* purchasers and mortgagees whose deeds shall be first recorded.

An experience stretching over the entire breadth of this country, and extending back as to parts of it for

[1] A very recent local Act as to Philadelphia has removed the limit of time, and between two *bona fide* purchasers, he who first records his deed has the better title.

more than two hundred years, has conclusively proved the value of the system of registration. But, like every thing human, the system is not perfect, and some of its defects, viz., the number of officers before whom acknowledgments of instruments may be made, and the want of proper guards of authentication of their authority, the effect generally given to the certificate of such officer whereby fraudulent personation is made possible, and the effect given to an officially certified copy without proof of the loss of the original, whereby forgery is made difficult of detection, have been set forth with much force and clearness in the very recent essay to which I have already referred. At the same time it must be borne in mind that the general system of conveyancing in the Western States (and it was to the more newly settled States that the distinguished author generally referred) is as simple, not to say loose, in those States when compared to ours, as ours is simple when compared to English conveyancing, and it may be safely affirmed of those of us who have largely been engaged in this branch of our profession that the frauds which are made possible by our system are comparatively rare. And it was said in the report of the last English Commission, only two years ago, that "all the recent perpetrators of land frauds have selected for their operations counties and districts where no registry exists, and to affirm that there are frauds, such as those carried out by fraudulent personation, which could not be prevented by registration, is only to say that there are certain forms of rascality in the world against

which no amount of precaution can effectually guard."[1] Judge Cooley suggests remedies for some of the evils to which he refers; one, the repeal of the laws which make the record primary evidence of genuineness and execution, and the other, the permanent retention in the record office of the recorded instrument. These, he admits, are but palliative, but he thinks this the extent to which any American State would now go. A more thorough, radical improvement would, he thinks, be a system such as is now in force in the British colonies of the Southern hemisphere, by which, in analogy to the registration of ships, each successive conveyance should represent an actual and undoubted title, subject only to such mortgages or other liens, leases, &c., as would be noted thereon. The subject is too large and important to be here critically examined, nor would time permit. It may, however, be here suggested that it is a significant sign of the change which may occur in the system of transfer of land when, in our largest capitals, corporations, established for the express purpose, insure titles to real estate as one insures a ship or a house, and that the business community deals largely with them. Such corporations, however, base their business almost solely upon registration.

In passing from the registration of deeds to a cognate subject—mortgages—the difference between the two countries is not less striking. True, the strict

[1] Report of Committee, p. ix.

rules by which equity protects the interests of the mortgagor are substantially the same on both sides of the Atlantic, but the simplicity and safety by which the interests of both mortgagor and mortgagee are protected in Pennsylvania, are perhaps unequalled elsewhere.

As in the case of deeds, so by the common law as to mortgages, no gage or pledge of land was good unless possession was delivered to the creditor, and, says Blackstone, "The frauds which have arisen since the exchange of these public and notorious conveyances for more private and secret bargains have well evinced the wisdom of our ancient law."[1] As we have seen, mortgages, as well as conveyances of land, came within our recording Acts, and from the earliest times were registered. In England and in some of our States, unless the mortgage contained a power of sale, the only remedy was by foreclosure, which involves the necessity of a suit in Chancery. But in our colony, there was introduced, as early as 1705, a remedy so simple and effective that it has practically remained unaltered from that day to this, viz., by writ of *scire facias*. The writ of *scire facias* is the appropriate common law remedy for the recovery or enforcement of that which is matter of record, properly so called, and the fact that a deed or mortgage was registered or recorded in an office, would not make it a record unless that office pertained to a court. It was not, as some have supposed, because

[1] 2 Blacks. Com. 160.

our colonists knew no better, that they gave the remedy by *scire facias* upon a mortgage, but they were strictly accurate, because the place of record originally was, as we have seen, the county court. Now when the liability of a debtor appeared by matter of record, the common law would not delay or hinder the rights of the creditor by reason of the death or absence of the debtor, and hence it came to be the law that a return of *nihil* to a *scire facias*, and another return of *nihil* to an *alias scire facias* were equivalent to actual service. The Act of 1705, reciting that as divers persons had mortgaged their lands in the province and died, leaving others to succeed them that had proved insolvent, and that others had neglected to pay the mortgage money, and so mortgages had become no effectual security, provided that where default had thus been made, it should be lawful for the mortgagee to sue out a writ of *scire facias* requiring the proper officer to make known to the mortgagor that he show, if anything he had to say, why the mortgaged premises should not be taken in execution for the payment of the mortgage money. If the defendant should appear, he could plead satisfaction, payment, or "any other lawful plea in avoidance of the deed or debt." If he did not appear, provision was made for judgment and execution. The Act was silent as to a return of *nihil* and an *alias scire facias*, and for the reason that, before the Act, the common law practice had prevailed in cases of *scire facias* upon judgments, recognisances, &c.; it was already a part of the common law of the

province; it needed no statute recognition, and hence the silence. But as we are told, the practice of selling mortgaged lands upon two returns of *nihil* is as old as the Act of 1705 itself.[1]

But although mortgages were originally recorded in the county courts, and although the process of *scire facias* was the remedy provided, yet the analogies of the common law were not perfect. Thus, although mortgages were required to be recorded, it was considered that the Act of 1705 being itself silent as to the recording, *scire facias* would lie upon an unrecorded mortgage, the action not being on the record, but on the mortgage itself, and hence a plea of *nul tiel record*, which would be good to an ordinary *scire facias*, is bad to our *scire facias* sur mortgage.[2]

On the other hand, the Act of 1705 having been introduced as a substitute for the remedy in equity by foreclosure, it was urged in the last century that it was governed by equitable principles, and it being the rule in equity that simple contract debts contracted by the mortgagor to his mortgagee though not expressly contracted on the faith of the first security shall be presumed in equity to have been so contracted, and that it will not aid the mortgagor's equity of redemption unless he do equity by payment of *all* the debts and thus save multiplicity of suits, it was contended that a similar rule should be applied here. But our Supreme Court held that we

[1] Warder *v.* Tainter, 4 Watts. 274.

[2] Frear *v.* Drinker, 8 Barr, 520; Tryon *v.* Munson, 27 P. F. Smith, 260.

had a positive statute directing the mode of proceeding upon mortgages, entirely different from the mode prescribed in England, expressly confining the remedy of the mortgagee to the recovery of the principal and interest due on the mortgage, and there was no necessity to usurp the power of a Court of Chancery.[1] So, in our own times, it has been held that the grant of certain chancery powers to our courts, not having expressly included the jurisdiction in cases of mortgage, the remedies must be only, first, the common law ejectment, and, secondly, the *scire facias* provided by the Provincial Act of 1705.[2]

Again, a mortgage might arise in equity (I mean in England) out of the transactions between the parties and without any writing for the purpose. Of this, the most frequent instance is that of the deposit of title deeds, which, notwithstanding the dissent of high authority, is now considered as evidence of an agreement to make a mortgage which will be enforced in equity. Such a mortgage has no existence in this State. Not only does the Act of 1705 not recognise or mention any other mortgage than by deed, but all our recording acts have obvious reference to *written* mortgages.[3]

And lastly, the English rule which allows a junior mortgagee to squeeze out a middle incumbrance—one that comes in between the two—and which goes by the name of "tacking," has no place here. It could have

[1] Dorrow *v.* Kelly, 1 Dallas, 142.

[2] Ashhurst *v.* Montour Iron Co., 11 Casey, 30.

[3] Bowers *v.* Oyster, 3 Pa. R. 239.

none under our system of registration. For the basis of the doctrine is that when lands are mortgaged to several persons, each is ignorant of the security granted to the other, and the third mortgagee, before he can claim the protection which the possession of the legal title under the first mortgage gives him, must be absolutely without notice. But as our registry acts make the registry constructive notice to all persons, there is no basis for the doctrine of tacking, which, it may be here remarked, obviously has no application in those parts of Great Britain where registry acts are in force.

The contrast between our simple system of mortgages, both as to their effect and the remedy upon them, and that which prevails at this day in England and in some of our States, by foreclosure, need not be here dwelt upon. But it is a proof of the excellence of our system that when, in 1835, the Revisers of our Civil Code came to consider the propriety of granting certain equitable jurisdiction to our courts, they found nothing, after a trial of a hundred and thirty years, to improve upon with respect to mortgages. "Here," said they, "we have a system of our own, which possesses advantages of a peculiar kind, and, it appears to us, is preferable in all respects to the artificial and complicated system which has grown up in England. We find no defects in our law upon this point, and have no occasion to borrow any of the powers of the English Chancery. The recording Acts have relieved us from many embarrassing questions of frequent occurrence in England; and the

proceeding by *scire facias*, has rendered obsolete most of the law about foreclosure and equity of redemption."[1]

Before quitting the subject of the alienation of real estate, a word should be said as to the mode of barring estates tail. This, by the common law, was either by fine or common recovery, and such continued to be the law in England from the decision in Taltarum's Case in 1472,[2] down to the abolition, in 1833, of all real actions, upon the report of the Real Property Commissioners already referred to. We had been much in advance. There existed in this province, however unsuited to the community, some estates tail, and we brought with us the cumbrous and complicated machinery of common recoveries. It was not long before the colonists devised a speedier remedy for barring entails. In one of the statutes already referred to "for the acknowledging and recording of deeds," passed in 1705, it was provided that all such deeds and conveyances should be of the same force and effect here for the assuring of the said lands, *and for docking and barring estates tail* as fines and recoveries at common law, or deeds of feoffment in the Kingdom of England.

This Act was, as we have seen, repealed in 1710, when another was passed containing the same clause, which was itself repealed in 1713, and then, in the Act

[1] Report "On the Administration of Justice," January, 1835.

[2] Reported in Year Book, 12 Edw. IV, 19. A translation of the case will be found in White & Tudor's "Leading Cases in Real Property."

of 1715, which stands to this day, the objectionable words "and for docking and barring estates tail," were omitted from the section. After 1715, therefore, there was but one way of barring an estate tail, by common recovery. Of these, it would seem that there had been but three suffered in this county before the year 1750.[1] If history repeats itself, so do the devices of the law. When you shall hereafter come to read how, at first, collateral warranties were employed as a device to bar estates tail, and how, later, Taltarum's Case, reported in the Year Books, came to be decided in the time of Edward IV, you will find that the former was an iniquitous proceeding by which one who had no interest in the land bound it by his warranty, and that the latter was a barefaced *judicial* proceeding, collusively taken against a tenant in tail for the recovery of entailed lands, the result of which was the desired end of barring the entail and thus facilitating the alienation of land. It has been said by a modern author of great authority, "such a piece of solemn jugglery could not long have held its ground had it not been supported by its substantial benefit to the community,"[2] or, as was said by one of the best of our Chief Justices, "the device of a common recovery was founded on a fiction, and not to be defended on any principle of sound reason. But it answered a good purpose, and the end justified the means."[3]

[1] Per Tilghman, Ch. J., in Lyle v. Richards, 9 Sergeant & Rawle, 331.

[2] Williams on Real Property, 45.

[3] Tilghman, Ch. J., in Lyle *v.* Richards, *supra.*

It was not likely that many estates tail in the province would be created by deed; they were generally created by will. This enabled our ancestors to employ a very simple device for barring entails. We shall presently see how, from the earliest settlement of the province, the colonists introduced the rule that a decedent's real estate should be liable for the payment of his debts—a doctrine as to which they were a century and a half in advance of the law in England. Advantage was taken of this as a means to bar estates tail, and by bringing an action against the executor of a testator whose will had created the entail, founded on some real *or supposed* debt due by the testator, the entailed estate was afterwards sold under an execution on the judgment.[1] And thus the same "good purpose" of barring an estate tail, led in England, in the thirteenth century, to the misuse of collateral warranties; in the fifteenth century, to the mockery of Taltarum's Case, and with us in the eighteenth century, to the selling a dead man's land to satisfy a debt which never had any existence.

And thus matters ran on until, in the year 1750, was passed a statute which made valid common recoveries theretofore suffered in the province, and provided that all future recoveries to be suffered should have the like effect to all intents for barring estates tail as by the laws of England they were received to be.

Whether this statute was merely declaratory of the

[1] Lyle *v.* Richards, *supra.*

law as it stood, and was passed to quiet doubts as to the validity of the recoveries theretofore suffered, or, as some have supposed, was passed for the express purpose of limiting common recoveries to the barring of estates tail (for they had other uses, the principal one of which was the destruction of contingent remainders),[1] has been made matter of question. The former is, perhaps, the better opinion. But whatever may have been its purpose, its practical result was that, within the next half century, more than two hundred common recoveries were suffered in this county.

It was after the Revolution that we passed an Act (that of 1799), which, though more precise in its language, did not materially differ from the old Acts of 1705 and 1710. Reciting the inconvenience and expense of common recoveries, &c., it provided, in effect, that estates tail should be barred by a simple deed of bargain and sale to be executed by the tenant in tail. The declaration therein of the intention to bar the entail, its acknowledgment in the usual way, its entry on motion in open court, and its being recorded within six months, were the only requirements of the Act.

It was not, as I have said, until the year 1833 that a similar enactment was passed in England, and although that statute has been pronounced to be "in

[1] And hence, in well-drawn instruments, the limitations to trustees to preserve contingent remainders. In the draft of the will which Chief Justice Chew gave to James Hamilton, such a clause was contained, but the testator not understanding it and thinking it superfluous, left it out. The result was the common recovery which became the subject of Lyle *v.* Richards, *supra*.

the wisdom of its design and the skill of its execution quite a model of legislative reform,"[1] yet the sections in question can hardly be said to be improvements on our own simple Act; indeed the words of the English statute, that every disposition of land by a tenant in tail shall be effected by some one of the assurances by which such tenant could have disposed of an estate in fee simple, more nearly resemble our own Act than the bankrupt statute of James I,[2] from which, it has been suggested, our Act may have been taken.[3]

Before leaving the subject of estates tail, it may be here mentioned that by a somewhat recent statute we have provided that whenever an estate tail should thereafter be created in any deed or will, it should be construed to be an estate in fee simple.[4] But there were two kinds of fees, absolute and conditional, and there were, besides, those estates tail which the law construed to be such from certain words, in order to save the limitations over. The effect of the statute, our Supreme Court has said,[5] has been to repeal the statute *de donis* as to the latter, and turn them into what they were before the 13 Edward I—fees conditional at the common law. And thus the effect of a modern statute has been, whether designed by its draftsman or not we may not say, to bring us face to face with the law of more than six hundred years ago.

Again, when by the common law land was conveyed

[1] Williams on Real Property, 47.
[2] 21 Jac. 1, c. 19, § 12.
[3] Sixth Report of Pennsylvania Revisers, p. 133.
[4] Act of 27th April, 1855.
[5] Nicholson *v.* Bettle, 7 P. F. Smith, 387.

or devised to two persons and their heirs, they held as joint tenants, and the survivor took the whole estate. This well suited feudal times, and was hence favored by the old law. In modern times, the reason ceased but the law remained, and courts have, for the last two hundred years, struggled against every construction towards joint tenancy, but have been "unable, without a dangerous prostration of established principle, to go as far as they wished."[1] Hence our Legislature, in 1812, passed the statute by which survivorship (except in trust estates) in joint tenancy was abolished. No such change has been made to this day in England.

In passing from the tenure and alienation of land *inter vivos* to the subject of the effect of death upon the estate of its possessor, we find a marked contrast between Colonial and English jurisprudence.

With respect to the devolution of estates, although in some of the colonies the English law of primogeniture prevailed, yet this was never the case in Pennsylvania, though for more than a hundred years, in accordance with the Mosaic doctrine, the eldest son took a double share. As far back as an early province law, before the charter, it was provided, in 1676, that the surplusage after debts paid was to be equally divided between the widow and children, viz., one-third of the personal estate to the widow, and the

[1] Bombaugh *v.* Bombaugh, 11 Serg. & Rawle, 192.

other two-thirds amongst the children, provided the eldest son have a double portion.

The charter to Penn, however (which abrogated the previous laws) provided that the laws for regulating and governing property within the province, as well for the descent and enjoyment of lands as likewise for the enjoyment and succession of goods and chattels, should be and continue the same as in England, until the said laws should be altered by Penn and the freemen of the province.

This, therefore, introduced, for the time being, the rule of the common law, and neither the "Laws agreed upon in England" nor the "Great Law" had any reference to the devolution of estates of intestates. The first alteration was made in the next year, providing, rather vaguely, that the estate of an intestate should go to his wife and his child or children; failing them, to his brothers and sisters and their children; and failing them, one-half to the parents and the other half to the next of kin.

Next was passed the Act of 1684, giving to the wife, as at the present day, one-third of the personal estate absolutely, and one-third of the real estate for life, the rest of the estate to the children, the eldest son having a double share.

In 1693, 1697, 1705 and 1764, other statutes were passed, not materially altering the devolution and still preserving to the eldest son his double share, and so the law continued till after the Revolution, when were passed the Acts of 1794 and 1797, which established the system of descents upon

the basis of equality. It did not, however, provide for every case, and every *casus omissus* was, of course, held by the Supreme Court to be ruled by the common law. The Act of 1797 was intended to cover every possible contingency, without, however, providing for possible omitted cases (and such there were) by any *general* rule, and these Acts of 1794 and 1797, which, said the Revisers of our Code in 1834, "have received more praise for their intention, than for the manner in which the details are exhibited and declared,"[1] contained our scheme of descent and distribution until the revised statute of 1834 was reported and passed.

This Act effectually prevented the recurrence of such omitted cases as I have just referred to, by providing, after a recital that it was the true intent and meaning of the Act that the heir at common law should not take, in any case, to the exclusion of other heirs and kindred standing in the same degree of consanguinity, that in every case which might arise not expressly provided for by the Act, the real as well as personal estate of an intestate should pass to his *next of kin* without regard to the ancestor from whom such estate might have come; and this sufficiently identifies who would take, as the mode of computing kindred, was, as it was said, well established by the rules of the civil law.

Only two alterations in the law need be noticed here. One was a departure, for the first time, from

[1] Second Report of Revisers, p. 27.

the rule requiring that there should be issue born alive capable of inheriting the estate as a prerequisite to tenancy by the curtesy, a rule derived, according to the better opinion, from the feudal system, and having no foundation in reason in the present state of society. The other was the restoration upon the statute book of the rule, of great antiquity, and found, among other places, in the Code of Justinian, that there shall be no representation admitted among collaterals after brother's and sister's children. The reason of this old and well established rule was simply one of convenience. Among lineal descendants, there was no great difficulty in tracing descents, but it was thought that the delay and hardship of requiring search to be made indefinitely for descendants of brothers or sisters, uncles or aunts, scattered, perhaps, over a large part of the country, led to increase of litigation.

Such a provision did, indeed, exist in the Act of 1705, and it governed the distribution of estates in the province till the passage of the Act of 1794, from which it was omitted, it was supposed by inadvertence. The old rule was, therefore, restored and still continues, except that by a recent Act passed in 1855, the representation is continued beyond the children to the grandchildren of brothers and sisters; and this was to remedy the supposed injustice that the grandchildren of brothers and sisters were excluded whenever there were brothers and sisters living.

Meanwhile, in England the law remained without material alteration from its state when the colonists left it. In 1831, upon the report of the Real Prop-

erty Commission, a bill was introduced to abolish the rule that issue in curtesy must be born alive, but it failed to pass. Some changes were, however, made in the year 1833, by "The Act for the amendment of the law of inheritance." Primogeniture was, of course, retained. "This," said the commissioners, "appears far better adapted to the constitution and habits of this kingdom than the opposite law of equal partibility, which in a few generations would break down the aristocracy of the country, and, by the endless subdivision of the soil, must be ultimately unfavorable to agriculture and injurious to the best interests of the State."[2] Not that this ancient right does practically affect the devolution of many large estates, for those which are not already settled are seldom suffered to pass by the intestate laws. The sentiment of the right is, however, kept up, and however absolutely free is the option of a large land owner to devise his estates as he pleases, the instances are rare in which more is done for the daughters and the younger sons than a moderate provision.

The chief alterations of the old law were:

1. The abolition of the rule, according to the maxim *seisina facit stipitem*, that descent should be traced from the person who last had the *seisin*, "a rule not grounded," said the commissioners, "on any solid principle," and producing anomalous consequences; "it may happen that one part of a family estate, having been in the occupation of a

[1] Act of 27th April, 1855.

[2] First Report of English Commissioners in 1833, p. 7.

tenant, shall go one way; another part, as to which the possession may have remained vacant during the time of the person last entitled, shall go another way."[1] It was therefore recommended and enacted that descent should be traced from the purchaser in its technical sense, but the last owner should always be considered the purchaser, unless the contrary be shown. It may here be noticed that the maxim referred to was long since virtually abrogated on this side of the Atlantic.

2. The abolition of the rule that "the inheritance lineally descends but never lineally ascends"—a rule of which the explanation of its origin is as doubtful as the rule itself was hard, and which for many years has had no place with us—and the admission of parents and lineal ancestors to the inheritance.

3. The abolition of the rule that the half blood shall never inherit.

In our States the half blood either inherits equally with the whole blood, or is postponed to it, but in none of them totally excluded.

4. The abolition of the old rule that where a person takes the same estate by purchase as he would by descent, he shall be adjudged to take by the latter (the title of heir having been theretofore considered as higher than that of grantee or devisee), and the introduction of the more reasonable doctrine that a person shall take according to the instrument.

5. The abolition of the rule that attainder worked

[1] Report of Commissioners, p. 15.

corruption of the blood, an effect which, according to the rigor of the common law, was produced not only by treason but every description of felony. In none of our States does treason or felony work corruption. At the most, in some of them, there is forfeiture for treason during the lifetime of the offender, and the Constitution of the United States, as far back as 1787, expressly declared against the rule. Romilly had, indeed, in 1814, introduced in Parliament a bill abolishing all corruption of blood, but it was so opposed that the Act was limited to cases of treason and murder, or abetting the same.

England has not yet, however, even softened or touched the rigor of the common law which, considering an illegitimate child as *nullius filius*, denies to it inheritable blood. From the Statute of Merton[1] (which was merely declaratory) to the present day, the law has remained inflexibly the same. The English Commission scarcely paused even to allude to, much less break in upon it. The rule has long been modified in most of the United States, (though in Pennsylvania, it must be said, only as lately as 1855, and to a limited extent),[2] and some of them have introduced the rule of the civil law, which is and has long been the law in Scotland and many parts of the Continent, that the subsequent marriage of the parents legitimatizes the offspring.

There was a case decided this summer in the

[1] 20 Henry III, c. 9, A. D. 1235.

[2] Act of 27th April, 1855, providing that illegitimate children may inherit from their mother and from each other.

English Court of Appeals, where an interesting question arose.[1] A woman died intestate, domiciled in England, leaving personal property there. Her next of kin was a niece, domiciled in Holland, illegitimate by birth, but, by the law of Holland, this had been cured by the subsequent marriage of her parents, and the question came up, could she inherit in England? One of the best Judges living, the present Master of the Rolls, decided, and perhaps according to the weight of authority, that she could not. But this was reversed on appeal, and the opinion of a majority of the court was almost the last which Lord Justice James lived to pronounce. He said: "We have in this country, from all time, refused to recognize legitimation of issue by the subsequent marriage of the parents, and possibly our peculiarity in this respect may deserve all that was said in its favor by Blackstone, the somewhat indiscriminate eulogist of every peculiarity and anomaly in our system of law." And the Lord Justice rose to unwonted eloquence when he contrasted the liberality which had made England for centuries a country of hospitality and commerce, with the insular vanity which beginning with "the historical or mythical legend that the English barons and earls, many centuries ago, cried out in Latin, *nolumus leges Angliæ mutari*," ended in "inducing us to think that our law is so good and so right, and every other system of law is naught,

[1] In re Goodman's Trusts, Law Rep., 17 Chan. Div. 266.

that we should reject every recognition of it as an unclean thing."

It affords a striking contrast between the law of the statute book and the law of society, that at the present day one of the best specimens of the English aristocracy, a man whose broad charity ranks with his refined taste, and who has received honors and title from a sovereign noted for adherence to conventional form, would, by the law of England, have been utterly disqualified from inheriting the great wealth which fortunately came to him under the will of his father.

It is natural to pass from the devolution of estates to their administration.

Penn's charter gave him power to appoint among other things officers for the probate of wills and for the granting of administration.

A little thought as to what was the law in England with respect to this, will show how inapplicable was its machinery to the wants of the new colony. For England was then as now divided, ecclesiastically, into the provinces of York and Canterbury; each of these was divided into dioceses, and the Bishop of each diocese where a decedent had his domicile, possessed, by the name and style of the *Ordinary*, the jurisdiction of the probate of wills, the granting of letters testamentary, the appointment of administrators, and the control over them and their accounts, and the courts in which these and cognate matters came up for judicial action were ecclesiastical courts, of which the principal ones were the Prerogative Courts of

Canterbury and York, the Peculiar, the Royal Peculiar and certain manorial courts.

Just how and why this subject matter of the law thus came under the cognizance of the ecclesiastical instead of the civil courts, you will hereafter learn in the course of your studies, and it need not be dwelt upon here.

But while this was so as to the estates of *decedents*, the care of the persons and estates of *infants* had been, from an early day, vested in the sovereign as *parens patriæ*, and was, later, exercised, as it is to this day in England and some of our own States, by the Court of Chancery.

But our colonists needed neither ecclesiastical courts for their decedents, nor a *parens patriæ* for their infants. Before the charter, provision had been already made for the probate of wills and granting of administration by the Court of Sessions, as also for the distribution and sale of the estates of decedents, and for the filing of an inventory by "all persons who have any estate in their possession belonging to any that are under age." Provisions were made in the "Laws agreed upon in England," as also in the "Great Law," for a Register for births, marriages, burials, wills and letters of administration, and the Register-General was, after the Charter, appointed by the Proprietary and granted letters.

The act of 1705 was precise as to the appointment by the Governor of the Register-General, who should keep his office at Philadelphia, and from time to time constitute deputies in each of the other counties.

From the preamble to the Act of 1712, it would seem that no Register-General, either for the other counties or even for Philadelphia, had been appointed, and the provisions of the Act of 1705 were thereby re-enacted, with others, providing for the appointment of a Register-General by "the Commissioners, Agents or Stewards of the Proprietary," if *he* should neglect, and in case of *their* neglect, by the Judges of the Court of Common Pleas of Philadelphia County.

The law as to Registers remained unaltered till the Revolution, when, owing to the change of Government, the office of Register-General was, by the Act of 1777, abolished, and an office called the "Register's Office," established in each county, and such is substantially the law to the present day.

To the Register and the Register's Court was committed that class of cases relating to decedent's estates which were cognizable by the Ecclesiastical Courts in England; and this continued until, by our recent Constitution of 1874, the jurisdiction of the Register's Court was transferred to the Orphans' Court.

The Orphans' Court had a different origin, and was taken from one of the customs of London. If the sovereign had, as we have seen, as *parens patriæ*, the care of the persons and estates of infants, "the custom of orphanage, one of the most considerable customs of London as it respects the children of freemen who died possessed of great personal estates,"[1] was of at

[1] Bohun's Privilegia Londini, 313,

least equal antiquity. The Court of Orphans was held before the Lord Mayor and Aldermen of the City of London, and the custom was that "if any freeman or freewoman die, leaving orphans within age, unmarried, the said court have the custody of their body and goods." To this end, executors and administrators were bound to exhibit true inventories before it, and to become bound to the chamberlain to the use of the orphans, to make a true account upon oath, on pain of commitment. As in the case of a ward in chancery, it was a contempt to marry one without the leave of the court, it was equally a contempt of the Court of Orphans, who promptly acted by fine and imprisonment, and as was and is the case with the Court of Chancery, only released its severity upon submission by the offender, and making a proper settlement.

Many of the colonists came from the City of London, and it was not accidental that some of the laws upon our early statute books, and some of our customs not found in written laws, were the same as those according to the custom of London. We have already noticed the early and vague laws of 1676, of 1683, and of 1693, but in 1701 was passed a law of greater precision. It was an elaborate Act for establishing courts of judicature, and gave to the Orphans' Court jurisdiction over all persons entrusted with the property, real and personal, of orphans or persons under age, either as guardians, tutors, trustees, executors or administrators. You will observe that this was still an *Orphans'* Court; it had no jurisdiction

over executors or administrators, except as to the property of *minors* in their hands, and as to such property, its jurisdiction extended to both *lands* and chattels. This was in 1701. Then in 1705 was passed the *intestate* law we have already referred to, by which administrators (not executors) were to account to the Orphans' Court (meaning the Orphans' Court under the Act of 1701,) which also had jurisdiction of the distribution of the surplus, the partition of the real estate of intestates, and its sale for the payment of debts and maintenance of children. But in the same year the Orphans' Court Act of 1701 was repealed in England, and the Intestate Act of 1705 stood, so to speak, alone, and this continued for eight years. Then in 1713 was passed "An Act for establishing Orphans' Courts," under which and its supplements we acted until the revised statute of 1832. Reciting the existence and repeal of the former laws, and that thereby orphans and persons concerned for them or intrusted with their estates labored under great inconveniences, the Orphans' Court, composed of the Judges of the Court of Quarter Sessions in each county, was established as a Court of Record, and jurisdiction given over all persons who, as guardians, trustees, tutors, executors, administrators or otherwise, should be entrusted with or accountable for lands, tenements, goods or estates belonging to any *orphan or person under age.* The Register was obliged to transmit to the Orphans' Court, copies of all inventories, accounts, &c., and power was given to the court to dismiss administrators in certain cases, and to

exercise all the jurisdiction granted to the Orphans' Court by the Intestate Act of 1705. And so things remained until after the Revolution. Since then, various supplements to the Act of 1713, and other Acts, have greatly enlarged the power of the Orphans' Court, and in the Constitutions of 1776 and 1790, the Orphans' Court was enumerated as one of the courts of the Commonwealth. Still, however, its precise position was less settled and defined than that of any court therein. Though expressly created a court of record, and as such coming within the rule of all English speaking countries, that its judgments could not be enquired into collaterally, cases were decided in which the rule *was* applied, and others in which it was *not*. The reasons for this were clearly given by the Revisers of our Code, when, in 1830, they were expressly directed—such was the urgency of the case —to give their first attention to the several statutes relating to the settlement of accounts before Registers and proceedings in the Orphans' Courts.[1] "The peculiar structure of that court," said they, "its extremely ill defined sphere of jurisdiction, the magnitude of the interests upon which it operates, the uncertainty of the code of law by which it is regulated, and its equally uncertain and insufficient practice and process, serve to surround with difficulties every attempt to frame a regular system for it."[2]

The Act reported and passed brought harmony and

[1] Joint Resolution of 23 March, 1830. Pamphl. Laws, p. 409.

[2] First Report of Revisers, p. 7.

symmetry to the subject, although the court was still composed of Judges of the Courts of Common Pleas. Finally, by the Constitution of 1874, the Orphans' Court was erected into a separate and independent tribunal, the separate Register's Courts were abolished, their jurisdiction given to the Orphans' Court, and the Register himself made the Clerk of the Court. Its jurisdiction, and that of the Register, may be thus briefly summed up:

1. The Register has the old jurisdiction of the *Ordinary* in England as to the probate of wills, and the granting of letters testamentary and of administration, and in his office are filed the accounts of executors, administrators, guardians and the final accounts of ~~and testamentary trustees~~. There his power ceases.

2. The Orphans' Court has the appointment of guardians, of power of dismissal of executors ~~and~~ administrators and guardians and the appointment of others in their place; the settlement of their accounts, and the distribution of the personal estate; and so far its jurisdiction is in analogy to that of the Ecclesiastical Courts. But above and beyond this, its large and extended jurisdiction, including every case in which the estate of a decedent or the care of infants and their property is involved, is in analogy to the jurisdiction of the Court of Chancery, and is exercised substantially in the same manner.

Meanwhile, in England, it was not until our own time that any substantial change was made, and the jurisdiction of the Ecclesiastical Courts continued as for centuries it had, until the year 1857, when by the Act of 20 and 21 Victoria, c. 77, the jurisdiction and

authority of all ecclesiastical and other courts in the probate of wills and granting administration were given to the Court of Probate. And now, by virtue of the Judicature Act of 1873, the jurisdiction of the Probate Court is exercised by the Probate, Divorce and Admiralty Division of the High Court of Justice.

Such, then, were and are the courts in which the estates of decedents were administered, and as to the administration itself a sharp contrast is at once presented between the English and the Colonial law as to the liability of a decedent's land for the payment of his debts. At an early stage of your education you shall learn how the feudal doctrines cumbered land with restraints in order to prevent its alienation, and how, later, the change of times removed these fetters to such an extent that the heir and the purchaser were protected at the expense of the creditor, and, within the present century, one of England's best lawyers opposed legislation which sought to reform this evil, on the ground that the heir's right to the real property of his ancestor ought not to be disappointed by the claims of creditors. It has been, within the recollection of many of us, the law of England that a man might borrow £100,000 to buy an estate, and, dying, leave it to his son, without a penny of the debt being repaid. And for hundreds of years the few statutes which came to the help of the creditor fell far short of the need.

On the other hand, from the earliest settlement of some of our colonies, the doctrine of the liability of a

decedent's lands to the payment of his debts, whether due by matter of record, specialty or simple contract, may be said to have grown up with the law. With us, you shall find it taken for granted in the oldest provincial statutes before the charter that, at least to some extent, land, as well as chattels, should be taken to pay debts. The "Laws agreed upon in England" provided that all lands and goods shall be liable to pay debts, except when there is legal issue, and then, all the goods and one-third of the land only, showing how, at the first, our ancestors still had something of the old country feeling that justice to the heir should precede generosity to the creditor. In the "Great Law," this was extended to "all the goods and one-half of the land only," "in case the land was bought before the debts were contracted," although this may be thought to be a rather unsatisfactory difference. In the Act of 1688, reciting briefly this provision, it was "for the fuller and more satisfactory explanation of the same," broadly declared that *all* lands should be liable to sale upon judgment and execution obtained against the defendant, his heir, executor or administrator, with only the restriction that the homestead should not be sold until a year after judgment.

The Acts of 1693 and 1697 again provided that all real estates and lands should be liable to be seized and sold for payment of the decedent's just debts, and the order of payment was the same as at the common law, viz.: 1. Funeral expenses; 2. Debts due to the Governor; 3. Judgments; 4. Debts by recognizance; 5. Debts by other obligations; 6. Bills;

7. Rents; 8. Servants and workingmen's wages; 9. Merchants' books and promises by word, arrears of account, and the like. We may skip a century and a half to see what is now the order of payment. The expenses of burial, now as then, hold the first place; debts due the Governor (or what is now the same, the Commonwealth) have slipped from the second place to the last, and servants' wages (not exceeding one year) have been, according to what was the very ancient common law, promoted from almost the last to the front rank. With respect to judgments, however, if these were such in the decedent's lifetime, they had and have priority, by right of lien, over all other debts, even funeral expenses; for as has been said by our Supreme Court, it illustrates the policy of our lien laws that a man, dying the owner of ample real estate, might have to be buried at the public expense as a pauper, if he had no personal property and his realty was incumbered by liens to its full value.[1] The Act of 1700 declared that to the end that no creditors might be defrauded of the just debts due to them by persons of this province who have sufficient *real* estates, if not *personal*, to satisfy the same, all lands and houses whatsoever should be liable to sale, upon judgment and execution obtained against the defendant, the owner, his *heirs, executors or administrators*, where no sufficient personal estate was to be found. This Act was in part supplied by the Act of 1705 (the same to which

[1] Per Woodward, J., in Wade's Appeal, 5 Casey, 329.

reference has already been made), which added that if the clear yearly profits would pay the debt in seven years, the lands should be delivered to the plaintiff upon a reasonable extent. "Under these Acts," said the Supreme Court in an early case, "the real estates of debtors have been held liable to sale by execution, whether they be living or dead; if living, under a judgment and execution against themselves; if dead, under a judgment and execution against their heirs, executors or administrators."[2]

In that case, it was contended that conceding the real estate of a decedent to be a fund for payment of his debts, yet inasmuch as the debtor himself could in his lifetime have aliened it before it became bound by judgment, so his death should not alter the case as to his heirs and devisees, who, it was urged, should equally have a right to alien before judgment recovered. But the court held that the construction of the law in the province had long prevailed that by the mere death of the debtor his debts, which, in his lifetime, were not liens unless reduced to judgment, became liens, and the real estate could be taken in execution in the hands of a purchaser from the heir or devisee. The case before the court was, however, one of intestacy only, and did not call for a decision as to the case of one who had *devised* his lands. At first sight such a distinction would seem to be without a difference, for if one's lands should go to pay his debts it would seem to be immaterial whether he died

[2] Graff *v.* Smith, 1 Dallas, 481.

testate or intestate. The common law, however, made such a difference, illogical as it would seem to be, and the devisee of one indebted, no matter how heavily, took the land clear of the debts.

The question again arose in our Supreme Court, four years after the decision I have referred to, though again the case was one of intestacy. It was argued, however, on the broad ground that the common law should prevail. In neither of the cases was it pretended that the statute *expressly* covered the case either of the debtor aliening the land when living, or devising it by his will, and, as to the latter, an illustration was given under the intestate laws of New Jersey, which were very similar to our own. One Leonard died indebted, seized of a considerable estate. He devised his lands to his nephews, who sold them and spent the money. A creditor of the testator, having obtained judgment against the executors, attempted to recover it from the lands so sold by the devisees, but on full argument he was, according to the rule of the common law, prevented from doing so. The doctrines of liens, it was further urged, should not be increased by the introduction of constructive ones, and it was of the utmost importance in an infant colony that the sales of real estate should not be fettered further than was necessary for the common welfare.

The Chief Justice, however, showed clearly what had been "the constant construction" of the Act of 1705 (called the Statute of 4 Anne), and the practice under it, based upon "universal opinion," and Mr.

Justice Shippen remarked, that "while in almost every province around us, the men of wealth or influence were possessing themselves of large manors and tracts of land, and procuring laws to transmit them to their eldest sons, the people of Pennsylvania gave their conduct and laws a more republican cast, by dividing the lands, as well as personal estate, among all the children of intestates, and subjecting them in the fullest manner to the payment of their debts," and he added that the early colonial Acts were taken in their utmost latitude for the purpose of making lands responsible to creditors.[1]

The effect of the construction thus given to the old colonial Acts of 1700 and 1705, was, of course, that the duration of the liens of the decedent's debts upon his land was indefinite as to time, and this was scarcely a less evil than that they should not be liens at all, for no one could say after what lapse of time it would be safe to purchase lands from an heir or devisee. Hence a legislative remedy was in the next year after the decision (1794), applied by a provision in the Intestate Act, somewhat altered by the subsequent Act of 1797, that no debts, except they be secured by mortgage, judgment, recognizance or other record, should remain a lien on the lands of a deceased person longer than seven years from his death (with a saving as to those under disability), unless a statement of the debt were filed in the office of the prothonotary of the county where the lands lie. And

[1] Morris *v.* Smith, 1 Yeates, 238.

so the law remained—namely, under the old laws of 1700 and 1705, slightly modified by the Intestate Acts of 1794 and 1797—until the Revised Statutes of 1834, which did little more than substantially re-enact them, reducing, however, the duration of the lien from seven years to five, in analogy to the law as to the lien of judgments.

Before passing from the construction of these colonial laws, we must pause to notice another old decision made upon them. If, as ran the common law, a creditor had no remedy in case first, the heir aliened the land before suit, or, secondly, the debtor had devised the land, it naturally followed that a sale made by an executor for the payment of debts imposed no liability on the purchaser to see that the debts were really paid, unless the sale was for the payment of debts scheduled in the will. It was not a case of lien, for lien there was none; it was a case of seeing or not seeing that a trust was properly executed. But with us it was a case of lien; and in the year 1795 the question came up whether such a sale by an executor, viz., for the payment of debts not scheduled, discharged the liens of the decedent's debts. The two decisions I have just referred to, one of them made but two years before, were cited to the court, and it was urged with much force of argument that if a man's *devise* to another should not discharge his land of his debts, so should not his voluntary direction to his executor to sell them have that effect. In the case actually before the court the devise was for the payment of *legacies*, not *debts*, and

the court had no doubt that the debts were not discharged, but they expressed the opinion, which has since been consistently acted upon, that a sale by an executor under a power of sale for the payment of debts *and* legacies, discharges the lien of all debts which are not of record.[1] It has never been held that a sale under a mere power, without specifying the purpose, discharges the lien of debts. True it is, that in a case decided less than ten years ago the learned judge whose opinion at *Nisi Prius* was affirmed by the Supreme Court, said: "A general power to sell will, of course, be conclusively presumed to be for the payment of debts."[2] If this were so, its exercise would, equally of course, discharge the lien of debts, but the case at bar did not require such an extension of the rule, there has been no other case to the same effect, and the practice of the profession is not in accordance with it.

Contrast this, now, with the legislation in England. By the common law, the creditor gained a little by the death of his debtor; for so long as the debtor remained alive the creditor could not sell the lands at all under execution, and the Statute of Westminster II, gave but the right to have one-half of them extended by writ of *elegit*. When he died, however, an action lay against the heir upon all debts due *by specialty*, under which all the lands descended could be sold under execution. But if the heir should alien

[1] Hannum *v.* Spear, 2 Dallas, 291.

[2] Evans *v* Chew, 21 P. F. Smith, 51.

before suit brought, his purchaser took a good title free from the ancestor's debts. And if the owner of land should take the trouble to make a will, his creditor would be effectually baffled, for, as we have seen, his devisee would take the land clear of all liability. Under this state of the law, the payment of one's debts became a mere question of morality; and, said a learned judge, "A man was said to sin in his grave who did not sufficiently provide for the payment of his debts."[1] But though the effect of this was that courts of equity strained the ordinary rules of construction, and held that a mere general direction that his debts should be paid charged a testator's debts upon his real estate, yet so the law itself continued, and for hundreds of years, until, in the year 1691, was passed "The Statute of Fraudulent Devises,"[2] which provided, first, that devises of lands, except for payment of debts, should be taken to be void as against specialty creditors, and, secondly, that if the heir should alien the land before process issued, he should be answerable for such debts in an action of debt, saving that lands *bona fide* aliened should not be liable. This did not go very far, and the shortcomings of the statute were not attempted to be supplied till within our own time, when not only was the scope of the Act enlarged but lands were for the first time made assets for the payment of simple contract debts.

It is, moreover, rather remarkable that although the

[1] Per Sugden, Ch., in Bermingham *v.* Burke, 2 Jones & LaTouche, 699.

[2] 3 & 4 Will. & Mary, c. 14.

English Parliament hesitated or refused to amend the defective state of the law at home, it did not hesitate to legislate for its colonies, or rather for the English creditors of the colonists. In the year 1732 was passed the Act "For the more easy recovery of debts in the plantations and colonies of America," which recited that his majesty's subjects trading to the plantations in America lie under great difficulties for want of more easy methods of recovering debts due to them, and as it would tend very much to the retrieving the credit formerly given by the trading subjects of Great Britain to the natives and inhabitants of the plantations if such inconvenience were remedied, and provided that houses, lands, &c., in the British plantations in America, should be liable to and chargeable with *all* just debts, and should be assets for their satisfaction as real estates were by the law of England liable to the satisfaction of debts due by bond or other specialty.[1]

It is believed that this statute was rather by way of declaration of the law as it already existed in the colonies than by way of remedy. We have seen that it was certainly so in Pennsylvania, the history of other colonies shows the same, and within the last few years it was shown, in a case decided in the Privy Council, that in the *West India* colonies, lands had been, from their earliest settlement, assets for the payment of *all* debts.[2]

[1] 5 Geo. II, c. 7.

[2] Turner *v.* Cox, 8 Moore's Privy Council Cases, 288.

It is matter of history that, in 1817, Romilly labored hard and vainly to establish so simple a measure of justice as that all a man's estate, real as well as personal, should be liable for the payment of all his debts, and it required, sixteen years later, the exhaustive report of the Real Property Commission, before Parliament passed the Act by which land was made assets for the payment of simple contract debts. To this day, however, neither debts due by specialty nor simple contract debts are *liens* on the lands of a decedent, but, in the absence of proceedings taken by the creditor, the heir or devisee may alien, and in the hands of the purchaser the lands are not liable.

I have already referred to our Orphans' Court having been taken from a like court of great antiquity, according to the custom of London. Other customs of London were brought here. We may notice, first, the law as to foreign attachment. By the custom, " if any plaint be affirmed in London against any man, and he is returned *nihil* (that is, if he be not found), if the plaintiff will surmise any other man who is within the city, is debtor to the defendant, in any sum, he shall have his garnishment against him for him to come and answer if he be indebted in the form which the other hath alleged, and if he comes, and does not deny it, then this debt shall be attached in his hands."[1]

This custom of foreign attachment prevailed here since our earliest settlement. By reason of a clause

[1] Bohun's Privilegia Londini, 253.

in the Act of 1684, by which no inhabitant should be taken for debt before trial unless he were about to depart from the province, some began to scruple the legality of proceedings upon attachments, and consequently, by the Act of 1699, "that all doubt might be removed in that behalf" it was enacted that "all writs theretofore granted pursuant to any customs of cities or corporations in England, or according to any custom or usage in these parts of America, and all the judgments and proceedings had thereon, should be most absolute and conclusive in law against all persons concerned." Then followed directions as to the grant of writs by the county courts "as they heretofore have done"—the proceedings thereon—that the person whose goods were attached should be called the defendant and the person in whose hands they were attached, the garnishee—the manner of executing the writs—how they might be dissolved, &c.

In the next year this Act was supplied by another called "The law about attachment," which was repealed in the year 1705, whereupon the Assembly immediately passed another, which, not differing materially from the former Acts, practically remained in force for more than a hundred years.

At the present day nothing is better settled than the difference between foreign and domestic attachment; the former is simply a process whereby to compel an appearance from a non-resident debtor, prosecuted by the plaintiff for his individual benefit who, as against other creditors, acquires priority; the latter is a process against the property of a *resident*

debtor, who conceals himself or absconds, and the proceeding itself enures to the benefit of *all* the creditors.

From the preamble to an Act of 1723 as to domestic attachment, it would seem that this distinction was not understood or attended to in practice, as indeed will appear from the preamble to the Act of 1705 itself, and by the Act of 1723 the course of proceeding in cases of domestic attachment, chiefly taken from the English statutes of bankruptcy, was distinctly marked out. These provisions were revised and extended by the Act of 1807, as were those as to foreign attachment by the Act of 1789, and these, together, continued to be the law until the revision in 1836, when the laws now in force, chiefly taken from the latter two, were enacted.

In passing to the remedy by action of replevin, its use in England was, at first, to restore to a tenant, chattels which had been taken from him by *distress*, and afterwards it was extended to all cases where they had been *unlawfully* taken. It does not appear that any of the customs of London enlarged the remedy beyond these cases. In the laws before the Charter, the form of the writ of replevin given in 1676 refers only to goods "distrained or impounded," as was also the case in that given in the Act of 1683. Except as to this form, no statute appears to mention this remedy until the Act of 1705 to be presently noticed.

It is not within the province of this lecture to do

more here than casually refer to the two kinds of replevin known to the English law; first, where the writ issues out of the Court of Chancery, and secondly, under the statute of Marlbridge, which entitled the sheriff, upon taking security, to make replevin without writ, which was called proceeding by plaint. Neither of these replevins could exist in our colony, for as we are told in an early case in the Supreme Court, as to the first, we had no Court of Chancery from which they could issue as an original writ, and as to the second, we had no such county court in which to enter plaint, nor any sheriff empowered by his own act to make replevin.[1] Hence it was necessary to make a law for ourselves, whereupon we passed the Act of 1705, directing that it should "be lawful for the justices of each county to grant writs of replevin in all cases whatsoever where replevins may be granted by the laws of England, taking security as the said law directs, and make them returnable to the respective Courts of Common Pleas in the proper county, there to be determined according to law."

It is probable that there had been writs of replevin before this statute, and that it was passed, as well to sanction an early colonial practice, as to provide for the future. However this may be, it is certain that the remedy by replevin, instead of being confined to the cases where alone it was applicable, took so wide a scope as to be used whenever a plaintiff claimed goods in the possession of another, "and accordingly,"

[1] Weaver *v.* Lawrence, 1 Dallas, 156.

said the Supreme Court in the case I have referred to, "things of great value, as ships, are frequently replevied."

This Act of 1705 is in force to this day and subsequent statutes have not materially altered it, while in England, it was not until the year 1851 that the Statute of 23 and 24 Victoria extended the remedy to "all cases of replevin, in like manner as to the cases of goods distrained for rent or damage."

Again, by the common law, a married woman had no capacity to contract so as to bind herself, and there was no such thing as a *feme sole* trader. But one of the customs of London was that "where a *feme covert* of the husband useth any craft in the said city on her sole account, whereof the husband meddleth nothing, such a woman shall be charged as a *feme sole* concerning anything that toucheth the craft, and if the husband and wife be impleaded, in such case the wife shall plead as a *feme sole*, and if she be condemned she shall be committed to prison till she hath made satisfaction, and the husband and his goods shall not be charged nor impeached."[1]

Without pausing to consider the decisions which have been made in England upon this custom, it may be said that there is no direct evidence that the custom, as such, was ever introduced in the very early colonial days. But in 1718, a statute—the first on the subject—was passed, which, after a long preamble

[1] Bohun, *supra*, 187.

which seemed to show that in the case of "mariners and others whose circumstances oblige them to go to sea leaving their wives in a way of shopkeeping," the wives who were left behind behaved better than the absent or returned husbands, provided that such wives should be deemed *feme sole* traders, and sue and be sued during their husband's lives without naming the latter, and execution awarded on judgments for debts so contracted should be against the goods in the possession of the wives, and not against the goods of the husbands.

This statute remains in force at the present day and unaltered, save by its extension, in 1855, to the case of a drunken and profligate as well as an absent husband. It was nearly a hundred years before its construction came before the courts in any reported case, and in 1816 it was urged that the legislature doubtless having had in view the custom of London in passing the statute, intended to make women liable precisely in the same degree as they were by the custom, according to which the *feme sole* was responsible only for *simple contract* debts, and could not bind herself by *specialty*. But the court held that under our statute the woman was placed on a different footing from the *feme sole* trader in London, and a much better one; for there, the *body* of the *feme sole* might be taken in execution, whereas here, execution could issue only against her property. Married women, therefore, it was held, stood in a different

position among us from any known to the law of England.[1]

And here comes in another illustration of the differences between the policies of the old and the new country. By the custom, a woman might not bind herself by specialty, because she might thereby bind her heirs—an injustice to the heir not to be tolerated. But, said our Supreme Court, "our judicial polity is grounded on more just and liberal principles. Heirs here are bound by the contracts of their ancestors, and all lands descend subject to the payment of debts," and it was held accordingly that a *feme sole* trader was liable under the statute, whether she bound herself by specialty or otherwise.[2]

In England, there has been no modification of the old law as to *feme sole* traders by the custom, though as we are now about to see, there has been, following the course of legislation in America, an important change as to other parts of the law as to married women.

The most remarkable instance of the introduction of one of the customs of London, and this, utterly unrecognized and unsupported by statute for nearly a hundred years, was that by which the estate of a married woman was allowed to pass by her simple acknowledgment before a magistrate, sometimes with, and sometimes even without a separate examination. The introduction of such customs as foreign attach-

[1] Burke *v.* Winkle, 2 Sergeant & Rawle, 191. [2] Id.

ment, *feme sole* traders and the like, might well have taken place without anxiety or apprehension, for at most they only affected the *status* of *persons* or gave a remedy, but an alteration in the mode of transfer of land involved more serious consequences, as affecting the security of titles. Now there was no rule of the common law more absolutely settled than that a married woman's conveyance of land, save by matter of record, was absolutely void, and the matter of record employed was that fictitious recovery in a real action, whose end—the *finis*—gave the name to the proceeding, a fine. Almost ignoring, as the common law did, a married woman's right to her personal property (so that her husband could absolutely sell her jewels out of her ears) yet it insisted that she could not be barred of her inheritance of freehold without an examination in due course of law. Such an examination, and that separate and apart from her husband, was a prominent part of a fine.

But while this was so as to the realm in general, yet it was also according to the custom of London that "if a man and his wife pass the wife's lands in London, and she be examined, it shall bind her by the custom."[1] Now there can be no question that the English law as to fines formed part of the law of the colony, and two fines at least are known to have been suffered prior to the year 1764. But our early laws, full as they were of provisions upon almost every conceivable subject which could affect the colonist,

[1] Bohun, *supra*, 72.

alive or dead, in the enjoyment and transfer of his property, both real and personal, in his conduct as a citizen, a husband, a father, a cattle owner, a church warden, even down to what he should eat, what he should drink and wherewithal he should be clothed, were yet curiously silent as to the manner by which the estate of a married woman should be transferred. The reason was that usage had supplied the law, and a practice had crept in, less precise than that under the custom of London but doubtless based upon it, by which such estates were transferred by a simple acknowledgment. In one of the earliest cases in our reports, decided in 1764, a special verdict was found that "for fifty years and upwards it had been the constant practice and usage of the province of Pennsylvania, in cases where *baron* and *feme* have been desirous to settle, sell and dispose of the estate of the *feme*, for the *baron* and *feme* to join in a deed or deeds, and for the *feme* to go before some justice of the peace in the county where the lands lie, out of court, and for the said justice to examine such *feme* in private and apart from her husband respecting her signing and executing such deed, and to interrogate her whether she became a party to and executed such deed with her full and free consent, and on her declaration that she freely consented, for the justice to certify the same under his hand and seal. And that a great number of titles to valuable estates in this province were held under and did depend upon deeds executed by *baron* and *feme* in manner afore-

said and that the title to such estates had never before been called in question."

It does not clearly appear from the report of the argument that the counsel in support of the deed distinctly relied upon the usage as based upon the custom of London, though as to the reasonableness of the usage the Year Books were cited to show that an examination of a *feme covert* before the Lord Mayor in London was good without a fine, and he also relied on the maxim which, had he relied on the custom need not have been called in aid, *communis error facit jus.* The court briefly held that this mode of examination of *femes covert* having generally prevailed in the province from its first settlement it would now be mischievous to overturn them, and that the maxim *communis error facit jus* could not operate more properly than in such a case.[1]

Four years after came another case in which counsel, not questioning the decision just referred to, urged that it could not apply to the case at bar because the deed had not even an acknowledgment or private examination.

And here it might have been well to stop, for surely the custom of London could not have sanctioned this; but, "it appearing in evidence that it had been the constant usage of the province formerly for *femes covert* to convey their estates in this manner without an acknowledgment or separate examination, and that there were a great number of val-

[1] Davy *v.* Turner, 1 Dallas, 12.

uable estates held under such titles, which it would be dangerous to impeach at this time of day," the court gave a charge to the jury in favor of the defendants, founded on the maxim, again invoked for the occasion, *communis error facit jus.*[1]

There can, indeed, be no question that such had been the practice, for when you shall come to turn over the early books in the Recorder of Deeds' office, you will find many deeds without any acknowledgment at all, the absence of which would not entitle the deed to be admitted to record even as to the *man*, unless, of course, proved by a subscribing witness.

In so serious a question as the title to real estate, such a maxim as *communis error* has no proper place, and although none of the judges who then sat on the Supreme Bench were lawyers, there were those in the province at that day who as justly deserved the title as any who have succeeded them, and it was naturally felt that legislative interference was necessary both to cure the past and to provide for the future. Accordingly, two years after the last of these decisions, there was passed the Act of 1770, "For the better confirmation of the estates of persons holding or claiming under *femes covert* and for establishing a mode by which husband and wife may hereafter convey their estates," which is in force to this day, and which is too familiar to be repeated. By comparing the words as to the separate examination,

[1] Lloyd *v.* Taylor, 1 Dallas, 17.

you will find them nearly word for word the same as in a fine.

It will be noticed that the declared object of the second section of the Act is to establish a mode by which the estate *of the wife* might be conveyed, and hence it was said in an early case that the statute will not apply where the wife only joined for the purpose of barring her dower;[1] but the point did not directly arise in that case, and when it did arise, two years later, it was distinctly held that the wife's right to dower would not pass by a deed not executed in conformity with the Act,[2] and it since been consistently settled that the statute extends to every interest and estate in realty of married women, and any instrument, of whatever nature soever, not acknowledged according to the provisions of the statute will pass no title to her estate. Hence, deeds defectively acknowledged being regarded as deeds unacknowledged, many decisions have been made as to what constitutes a sufficient compliance with the statute, the sum of which may be stated to be that while the exact language of the Act need not be followed, yet it must appear on the face of the certificate that its requirements have been substantially complied with, and parol evidence is very properly held inadmissible to supply the deficiency. These substantial requisites have been defined to be "that she be separately examined, that she have a

[1] Watson *v.* Bailey, 1 Binney, 475.

[2] Kirk *v.* Dear, 2 Binney, 341.

knowledge of the nature and consequences of the act she is about to perform, and that her will in the performance of it is free."[1]

The material provisions of this statute, whence alone comes the power of *femes covert* to transfer their estate, remain unaffected by subsequent legislation, for the Act of 1848, while largely increasing their right to acquire and hold property, has worked no change in their power to transfer it. The object of the latter statute was to remedy the evils consequent upon the husband's present possession in right of his wife, but the power of disposition, not being within the purview of the Married Woman's Act, was left untouched.

Thus much for the power of a *feme covert* to *transfer* her real estate. As to her capacity to *devise* it, she had absolutely none. With or without the assent of her husband, she was powerless to divert the title from her heir-at-law, the solitary exception being when the husband was *civiliter mortuus*. For a disposing mind was the theory of the right to devise, and the common law could not tolerate the idea that between *baron* and *feme* there could be more than one mind—his own. And when the Statute of 22 Henry VIII empowered every person to devise, *femes covert* were not considered to be included therein, for a will being a species of alienation, the statute was considered to apply only to those previously competent to convey. But in order to effectually remove all

[1] Evans *v.* The Commonwealth, 4 Serg. & Rawle, 272.

doubt and permanently retain the *feme covert* powerless, a statute, two years later, provided that wills of any lands by any woman covert shall not be taken to be good or effectual. And as a will made by a *feme sole* was revoked by her subsequent coverture, the result was complete intestacy in every case in which the wife died before her husband.

You have already seen that the Pennsylvania Revisers who reported the present Statute of Wills of 1833, did not recommend any extension of the right of devise of a *feme covert.* On the contrary, the very first sentence of the Act is, "Every person of sound mind (*married women excepted*) may dispose by will of his or her real estate," and the next section, providing that a married woman might, *under a power*, dispose of her real or personal estate by will or appointment in the nature thereof, and also that she might, with the assent of her husband, dispose of her *personal* estate by will, was no more than declaratory of the common law.

What is known as the Married Woman's Act of 1848 did not enlarge or at all affect the power of alienation by deed. It left untouched the husband's right as tenant by the curtesy, but, subject to this, declared that any species of property, real, personal and mixed, belonging to married women, should be owned, used and enjoyed by them as their own separate property, and further, that "any married woman may dispose, by her last will and testament, of her separate property, real, personal or mixed, whether the same accrues to her before or during

coverture. Provided, that said last will and testament be executed in the presence of two or more witnesses, neither of whom shall be her husband."

Such a plain and comprehensive provision leaves little scope for judicial interpretation, and I will refer to but one or two illustrations of it.

Inasmuch as the validity of a will depends upon the law at the time of its execution, it has naturally been held that the law had no retroactive effect, although the testatrix died subsequent to its passage.[1]

The provision as to the witnesses is, we have seen, "executed in the presence of two or more witnesses, neither of whom shall be her husband." Now by our Statute of Wills, although every will must be *proved* by two witnesses, yet, unlike the law of England and many of our States, they need not be *subscribing* witnesses; they need not have witnessed the execution of the will; it will be sufficient to prove by two witnesses the handwriting of the testator, and wills wholly unwitnessed are every day admitted to probate here. It might at first sight appear that the Legislature intended first, that the witnesses should, as such, attest the publication of the will by their subscription, and secondly, that as in the case of the separate examination of the woman, the husband should not be present. The first of these has not yet been made the subject of decision, but if the analogy from other cases under statutes of

[1] Kurtz *v.* Saylor, 8 Harris, 205.

wills should be adhered to, it would seem that the witnesses need not necessarily subscribe, however important in the way of future proof that they should do so; and as to the second of them, the Supreme Court has held that if two witnesses—other than the husband—be present, his additional presence will not avoid the will.[1]

After our colonists had left the mother country, the law in England as to the right of married women to transfer or devise their land remained for a hundred and fifty years as it had stood for centuries before. No statute interposed to say that a separate examination before an official should be as good as a separate examination in levying a fine. No statute mitigated the rigor of her intestacy. As, however, land was every day becoming more the subject of transfer, it was simply intolerable that whenever a man wanted to sell a house or an acre, a fine must be levied to bar his wife's dower. More than one device was resorted to, the last and most usual being that introduced about the middle or latter part of the last century, of conveying land "to dower uses," as it was called; that is to say, when a man bought land, instead of its being conveyed in the usual and natural way to him and his heirs, it would be conveyed to one or more trustees, to be held upon such uses as he (the intending purchaser and real owner) should appoint, and in default of and until appointment, to the use of himself and his heirs. Of course,

[1] Dickinson *v.* Dickinson, 11 P. F. Smith, 401.

if he should die without exercising his power, the wife's dower would attach, and, equally of course, he could, by appointing—that is, conveying—to his intending purchaser, pass a title to the latter clear of his wife's dower, for the purchaser would take from the donee of the power, and not in any way from the husband.

This, which was both scientific and clumsy, enabled the men to convey. As for the women, they, as respects their own real estate, were forced to rest content as those who had gone before them had done since, at least, the Conquest.

In 1832 was made the first step towards simplicity, when the Real Property Commission, in an elaborate report which exhaustively set forth the old law and the mischief, submitted to Parliament the remedy, by the "Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance," which became a law in the next session. It provides, in terms somewhat less precise than our Act of 1770, for the acknowledgment of deeds by married women before certain officers, who should "examine her apart from her husband touching her knowledge of such deed, and ascertain whether she freely and voluntarily consents" thereto, a certificate of which is, of course, attached to the deed.

Thus that which the colonists had, a century and a half before, introduced as part of their unwritten law, and a few years later had embodied in a simple statute, required, it would seem, all the professional skill which the mother country could command. "All

who are acquainted with the subject," says Lord Campbell, "must be aware of the tremendous difficulties which had to be encountered," and he is certainly not chary of praise when he pronounces it to be "one of the most wonderful efforts of the human mind."[1]

A subsequent Act authorizes a married woman to make every kind of conveyance or disclaimer of freehold estates which she could do if unmarried, with, however, the husband's assent and the separate examination.[2]

No other change, however, was made in the *status* of a married woman, until, eleven years ago, there was passed the Married Woman's Act,[3] which declared that the earnings of married women, their deposits in savings banks, their money in the funds, corporations, &c., and any personal property which she might inherit or become entitled to under deed or will, not exceeding £200, should be her separate property, as also any freehold property inherited from an intestate; this, you will observe, stops very far short of our statute.

The subject was again urged in the session of Parliament of 1880, and although an Act was passed as to Scotland, one which referred to England, though made the subject of debate, failed to pass.

It was the theory of the common law that the

[1] Lives of the Chancellors, vol. 7, p. 444.

[2] 8 & 9 Victoria, c. 106.

[3] 33 & 34 Victoria, c. 9.

object of each action was to determine the rights of the plaintiff as to the particular subject matter of his demand, and without regard to any claim which the defendant might have growing out of the transaction. To say nothing of the convenience of settling cross demands in one and the same controversy, it was of course monstrous that an insolvent plaintiff who owed his solvent defendant more than the amount he sued for, should be allowed to recover it, and hence the civil law had, ages ago, introduced the right of set-off under the name of compensation or stoppage. It formed, however, no part of the law of England, and no statute recognized it till the first of the statutes of bankruptcy in 1708,[1] twenty-six years after the Charter to Penn. The situation, then, in England of the law of set-off at the settlement of the colony was rather curious. As I have said, no statute recognized it till 1708, and it was long supposed that before the statute the doctrine was unknown in courts of law. It has, however, been shown in the present century[2] that, in 1675, the doctrine *was* enforced in courts of law.[3] We know that Equity had at some time or other adopted it, but when exactly, is not known. In a case decided in 1805, Lord Eldon said, "As to the doctrine of set-off, this court was in possession of it, as grounded upon principles of equity, long before the law interfered,"[4]

[1] 4 Anne, c. 17.

[2] By Mr. Christian, 1 Chr. Bank Law, 499.

[3] Anon. 1 Mod. 215.

[4] Ex parte Stephens, 11 Vesey, 27.

but how long before, he does not say. The first reported case was long after the Statute of Anne.

Such, then, was the state of the law when the colonists came over, and so far as I know, the first statute on the subject in the English language was passed by us here. For in the Great Law, it was provided that "for avoiding numerous suits, if two men dealing together be indebted to each other upon bonds, bills, bargains or the like, provided they be of equal clearness and truth, the defendant shall, in his answer, acknowledge the debt which the plaintiff demandeth, and defaulk what the plaintiff oweth to him upon the like clearness."

This was repealed in England eleven years later, viz., in 1693, when it was promptly re-enacted here, in exactly the same words. This again was repealed, and then in 1700 we passed another Act, also in the same words, and this was repealed in 1705. We immediately passed another Act, which was not repealed, and which constitutes our law on the subject to this day. Its provisions are so clear, so simple, that in a hundred and seventy-six years, we have found nothing to alter in it, and with a very slight exception, nothing to extend. It provides, in substance, that if persons dealing together be indebted to each other upon agreements or accounts, and one commences an action, if it shall appear that any part of the sum demanded be paid, then so much shall be defalked, and the plaintiff have judgment for the residue only, but if it appear that the plaintiff is overpaid the jury shall give their verdict for the

defendant and certify to the court how much they find the plaintiff to be indebted to the defendant more than will answer the sum demanded, and the sum so certified shall be recorded in the verdict and be deemed a debt of record, upon which, for recovery thereof, the defendant shall have a *scire facias* against the plaintiff.

The only supplement to this old statute is one passed in our own times (1848), giving to the defendant the right to immediate execution without resort to the *scire facias*, and however convenient this may be, it is well to remember that our ancestor's was the scientific remedy, for a *scire facias* lay to enforce that which was matter of record.

And all this was before there was any statute at all in England. The first was, as we have seen, in the bankrupt act of 4 Anne, and then, many years later, came the statutes of set-off of George II, none as comprehensive as our own. The last of them is a section in the Common Law Procedure Act of 1860,[1] as to the right of a defendant in a suit in which plaintiffs are improperly joined.

There were some other matters of contrast between the early Pennsylvania and English law as to which I will pause but for a moment.

It was the common law that a sale of personal property (except horses and property of the Sovereign) at a *market overt* passed a good title, without

[1] 23 & 24 Vict. c. 120.

regard to the real ownership. Blackstone, of course, considers this admirable, and part of "a necessary policy that purchasers *bona fide* in a fair, open and regular manner shall not afterwards be put to difficulties by reason of the previous knavery of the seller."[1] There were other learned men who thought otherwise, and considered that under pretence of market overt "men buy goods there for a small value, of persons whom they have reason to suspect."[2] Of this mind were our colonists, and from the first the usage of market overt was rejected.[3]

So, by the common law "If tenant for years, knowing the end of his term, doth sow the land, and his term endeth before the corn is ripe, in this case, the lessor or he in reversion shall have the corn, because the lessee knew the certainty of his term and when it would end."[4] This was the general common law of the realm, but there were certain parts of England where there was a special custom that a tenant should have the right to what was called "the way góing crop," and such a special custom was held in England, in a case which is the leading one as to the admissibility of evidence to prove a custom,[5] to be not only a good but a just custom. That which was a special local custom in a

[1] 2 Com. 450.

[2] Kelyng, 48, cited in Hosack *v.* Weaver, 1 Yeates, 479.

[3] Hosack *v.* Weaver, *supra*.

[4] Littleton, § 68.

[5] Wigglesworth *v.* Dallison, 1 Douglas, 201. 1 Smith's Leading Cases.

few parts of England, became with us a general one throughout the colony and was supported by judicial decision.[1]

It is a rule of universal application on both sides of the Atlantic that a trustee shall not profit by his trust, and this has been carried so far in England that nothing is better settled than that a fiduciary of whatever sort, trustee, executor or guardian, is not allowed to receive compensation for his services in the absence of provision therefor in the instrument creating the trust. A contrary rule prevailed in Pennsylvania, "extending as far back," said our Supreme Court, "as the testamentary law can be traced,"[2] and the provisions of a very early statute (1713) as to executors were by an equitable construction extended to trustees, and a reasonable compensation to fiduciaries is now so thoroughly settled that before the recent statute as to evidence, this right disqualified a fiduciary as a witness, on the ground of interest. In some of the other colonies the English rule was at first recognized, but this was soon corrected by legislation, and in none of our States does that rule now exist.

So it was the English law for hundreds of years that an executor became, by virtue of his appointment, entitled to all the personal estate of the testator

[1] Stultz *v.* Dickey, 5 Binney, 287.

[2] Wilson *v.* Wilson, 3 Binney, 560.

not specially disposed of. The settlement of this colony took place about the time when courts of equity, feeling the injustice of the rule (which was established when personal property was of comparatively small amount), began to hold that an executor should be considered as to the undisposed residue as a trustee for the next of kin, and this doctrine was at an early day established in Pennsylvania.[1]

Although dower was the favorite of the common law, still it was the rather singular doctrine and one for which no good reason was ever given, that although a husband could be tenant by the curtesy of England of a trust estate, a woman was not entitled to dower in the same. This distinction was never recognized in our colony, and the usage that a widow was dowable of a trust estate was so old that no one was ever known to doubt it, although it did not receive the approbation of the Supreme Court until the present century.[2]

Another departure from the common law arose from the geographical differences between the countries. In rivers in which the tide ebbed and flowed, whatever might be the rights of ownership as to the banks, yet the title to the bed of the river remained in the sovereign, while as to rivers which were not navigable they belonged to the owners of the adjoin-

[1] Wilson *v.* Wilson, *supra.*

[2] Shoemaker *v.* Walker, 2 Serg. & Rawle, 554.

ing lands on each side. Of course there are few rivers in England navigable above the flow of the tide, and "if such a river as the Susquehanna," said our Supreme Court, "had existed in England, no such law would ever have applied to it," and it was accordingly held that the concessions by Penn to his "first purchasers," that all rivers, rivulets, water courses, mines, &c., "shall be freely and fully enjoyed, and wholly by the purchasers into whose lots they fall," did not convey, even to these first purchasers, a right to the bed of a navigable river, and that there was no exclusive right of fishery therein. It was reiterated that only such parts of the common law of England as were adapted to our local situation had been received in this government. "The principle is self evident," it was said. "The adoption of a different rule would, in the language of Sir Dudley Ryder, resemble the unskilful physician who prescribes the same remedy to every species of disease."[1]

But however great may be the skill of the physician, it never shines so brightly as when, deprived by necessity of a remedy which is a specific, he adopts and turns to account one which had never been so used before. Such was the task of the Pennsylvania colonists as to the administration of equity. When

[1] Carson *v.* Blazer, 2 Binney, 477. There are few subjects, however, upon which there is a greater diversity of decision in this country, and in the majority of our States the common law rule is adhered to; Houck on Navigable Rivers, ch. III; as it has been in the Supreme Court of the United States; Jones *v.* Soulard, 24 Howard, 41.

first this colony was settled, the desperate struggle between Coke and Ellesmere had long been past, and Nottingham had already defined and illustrated those principles of equity which were, in later generations, administered by Somers, by Cowper, by King and by Hardwicke. The story has elsewhere been told of how our colonists seemed from the first and without exactly knowing what it was, to have desired that cases should be decided "according to equity as well as to law"—how there were many courts of equity established by early colonial statutes and how they were repealed—how at last one court of equity was established, with the Governor of the Province for its Chancellor, and how it lasted from 1720 till 1736—how it administered the jurisdiction of equity according to the course and practice of Chancery in England and how and why it fell—how deprived thus of the appropriate tribunal in which alone, according to the then judgment of the civilized world, this branch of the science of jurisprudence could be administered, it was sought to engraft (if you will pardon the simile) the graceful and beautiful foliage of equity upon the rugged old trunk of the common law, or in plainer words, how they administered the doctrines of equity through the medium of common law forms—with what skill this was done and how the good work went on amid the smiles and ridicule of sister colonies and States—how when, just a century after our court of Chancery had been abolished, our courts of law had an equity side added to their jurisdiction—how both the old and the new

remedies were then concurrently applied in the respective courts—all this has been told elsewhere, largely in an essay written fifty years ago by one who was then but a student at law,[1] and lastly, by him who just a year ago delivered in this place the introductory lecture to the University class.[2] No more attractive part of your studies can be found than this, and when you shall turn from it to the new Judicature Act in England, which, passed only six years ago,[3] has so revolutionized much that had long been held sacred in the Inns of Court and Westminster Hall, you will find that the ~~system~~ Lucian of ~~administering~~ law and equity ~~through the medium of common law forms~~, which our poor colonists ~~took up~~ adopted of necessity and almost in despair, has since been adopted in the parent country upon the deliberate judgment of her wisest men.

Such, then, are some of the contrasts in the growth of Pennsylvania and English law, and when in the future other materials shall be furnished to the world, the subject can receive a fuller illustration and be made more broadly useful.

[1] An Essay on Equity in Pennsylvania, by Anthony Laussatt, Jr.

[2] The Administration of Equity through Common Law Forms as practiced in Pennsylvania, by Richard C. McMurtrie, Esq.

[3] 36 & 37 Victoria, c. 66.

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